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IN THE

Supreme Court of the United States

NO. 77-922

CHRYSLER CORPORATION,
Petitioner,

v.

HAROLD BROWN, et al,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF GULF OIL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

JESSE P. LUTON, JR.
BURTON C. BRANSTETTER
JOSEPH H. SPERRY
P. O. Box 3725
Houston, Texas 77001
Attorneys for Amicus Curiae

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Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
IMPORTANCE OF CASE AND NEED FOR REVIEW	2
THE ISSUE	3
ARGUMENT AND AUTHORITIES	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

	Page
American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1968)	5
Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970)	5
Legal Aid Society of Almeda County v. Schultz, 349 F. Supp. 71 (N.D. Cal. 1972)	5
Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)	6
Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971)	5
Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974)	4
392 F. Supp at 1250	4
542 F.2d at 1210-11	4
542 F.2d at 1213	5

STATUTES

Freedom of Information Act, 5 U.S.C. § 5529 (1967)	2
Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238	6

MISCELLANEOUS

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 13 (1966)	6
Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1964)	3, 4, 5
Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 1619, 2114 (1972)	3, 4

	Page
Hearings on S. 1335 Before The Senate Committee on the Judiciary, 89th Cong., 1st Sess. 436-437 (1965)	4
Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards, 6 Loyola L.J. 594, 611 (1975)	7
O'Reilly, Government Disclosure of Private Secrets Under the Freedom of Information Act, 30 Bus. Lawyer 1125, 1134 (1975)	8

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Gulf Oil Corporation (hereinafter "Gulf") files this brief as *Amicus Curiae* to urge the court to grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals (3rd Circuit) entered in this case on September 26, 1977. All parties to this action have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Gulf is a plaintiff in a reverse Freedom of Information Act[1] (hereinafter "FOIA") case almost identical to *Chrysler*.

The business community, including Gulf, submits vast amounts of information to a myriad of federal agencies, much of which is confidential, such as chemical formulations of its products, estimated reserves of potential production of oil as well as identical matter at issue in *Chrysler* dealing with Affirmative Action Plans (AAP), compliance reviews and informative reports which go into minute detail as to the numbers of employees, their wages, duties, classifications, as well as future operational and organizational plans. Much of this information is private and proprietary and the confidential status of that information will be affected by the Supreme Court's ruling in *Chrysler*.

IMPORTANCE OF CASE AND NEED FOR REVIEW

There are a substantial number of reverse FOIA cases now pending in federal courts and more are being filed every day. Not only are there conflicting opinions in United States Courts of Appeal on such fundamental questions as: (1) the scope of judicial review of an agency's decisions to disclose; and (2) the type of information to be protected as confidential under statutes such as 18 U.S.C. ¶ 1905 and 5 U.S.C. ¶ 552(b), etc., there is even wider conflict among *federal agencies* concerning the manner in which disputes over disclosure should be handled.

1. Freedom of Information Act, 5 U.S.C. §5529 (1967).

Lower federal courts, federal agencies and suppliers of information have a compelling need for guidance from this Court in handling such issues, and unless such issues are resolved in a manner which properly and adequately protects the rights of submitters of *private* information, private companies and individuals will be discouraged from the submission of information necessary for effective implementation of legitimate regulatory government programs.

THE ISSUE

THE GUT ISSUE IN ALL REVERSE FOIA CASES WHERE AN INDIVIDUAL OR CORPORATION IS PLAINTIFF IS WHETHER THE FOIA AUTHORIZES THE DISCLOSURE OF *PRIVATE* RECORDS AND INFORMATION SUBMITTED TO THE GOVERNMENT IN CONFIDENCE AS WELL AS DISCLOSURE OF *GOVERNMENT* RECORDS.

ARGUMENT AND AUTHORITIES

It is perfectly clear from a plain reading of the FOIA and the Congressional Reports dealing with it that the intent and purpose of the FOIA was and is to make available to the public information concerning records and actions of the various *governmental agencies* and was not intended to make public reports, plans and data confidentially submitted to the government by *private parties*.[2] It

2. *Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 199 (1964) (hereinafter "Hearings on S. 1666"). (emphasis added).
Hearings on the Administration and Operation of the Freedom of Information Act Before A Subcomm. of the House Comm. on Gov-

should be noted that the information contained in the materials which Chrysler seeks not to have disclosed concerns *only* records and actions of Chrysler and is totally unrelated to any past or future actions of any Federal agency. Gulf's position is, then, that disclosure of these materials would be contra to the basic purposes of the FOIA.

The Court in the *Westinghouse* case[3] is one of the few courts to face this issue directly and observed that:

> "the Act was intended, to use the language of the Senate report, to set up workable standards for what records should and should *not* be open to the public for inspection."[4]

The FOIA was intended, and properly so, to foster full disclosure of *government* information to the public and the exemptions to the Act were specifically designed to create categories of information which Congress intended would not be disclosed. Consequently, while the FOIA exemptions should be narrowly construed concerning disclosure of information relating to the *government "agency's* actions, plans and policies", the exemptions should be given a considerable greater breadth with respect to disclosure of information concerning the "'actions, plans and policies' of *private* parties."[5] This

ernment Operations, 92d., 2d Sess. 1619, 2114 (1972) (hereinafter called *"Government Operations Committee Hearings"*). ....
Hearings on S. 1335 Before The Senate Committee on the Judiciary, 89th Cong., 1st Sess. 436-437 (1965).

3. *Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974).

4. 542 F.2d at 1210-11 (footnote omitted).

5. *Westinghouse Electric Co. v. Schlesinger, supra*, 392 F. Supp. at 1250.

is because the FOIA "was not enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations*, about what those individuals or corporations were doing, or about what their activities and policies are * * *;" rather "[t]he purpose of the . . . Act was to protect the people's right to obtain information about their *government*, to know what their *government* is doing, and to obtain information about *government* activities and policies."[6]

The Ninth Circuit stated in *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970), that the legislative purpose of the FOIA was to make it easier for private citizens to secure *government* information. It has also been noted by the Fourth Circuit that the FOIA was designed to guarantee the public's right to know how the *government* is discharging its duty to protect the public interest,[7] saying:

> "An exploration of the legislative history behind [the FOIA] reveals that the premier purpose of the act was to elucidate the availability of *government records and actions* to the American citizen. In addition, Congress sought to eliminate much of the vagueness of the old law . . ." *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1968). (Emphasis added)

It is also apparent from the discussion of the legislative history of the FOIA in *Legal Aid Society of Almeda County v. Schultz*, 349 F. Supp. 71 (N.D. Cal. 1972),

6. *Westinghouse Electric Corp. v. Schlesinger, supra*, 542 F.2d at 1213. See also *Hearings on S. 1666, supra*, at 174 ("We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.").

7. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971).

that the intent of Congress in drafting the FOIA was to eliminate loopholes in the predecessor statute[8] which allowed agencies to deny disclosure of legitimate *governmental* information to the public saying:

> "The reports of both the House of Representatives and of the Senate condemn the practices this loosely drafted statute permitted. The House Report notes:
>
> > In the time it takes for one generation to grow up and prepare to join the Councils of Government—from 1946 to 1966—the law which was designed to provide public information about *government activities* has become the government's major shield of secrecy.
>
> H.R. Rep. No. 1497, 89th Cong., 2d Sess. 13 (1966).
>
> The Senate Report adds the important observation that:
>
> > 'innumerable times it appears that information was withheld only to cover embarrassing mistakes or irregularities . . .' S. Rep. No. 813, . . ." (Emphasis added)

The foregoing discussion by the Legal Aid Court emphasizes that the former and present Freedom of Information statutes were intended by Congress to provide full disclosure of governmental records and activities.

The Court of Appeals for the D. C. Circuit has clearly stated that the chief purposes of the new act were to increase public access to *governmental records* by substituting limited categories of privilged material for the discretionary standards applicable under the old law, and by providing an *effective judicial remedy*.[9]

8. Act of June 11, 1946, ch. 324, §3, 60 Stat. 238.

9. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

It is noteworthy that the judicial remedy referred to by the *Soucie* court as having been provided by the FOIA is available only to one seeking to enjoin an agency from *withholding* agency records. The fact that no judicial remedy is provided to a party seeking to prevent an agency from *disclosing* records in the agency's possession is a further indication that the statute is aimed only at the disclosure of *agency* records and is not applicable to the disclosure by the agency of the records of *private* individuals or corporations which may be in the agency's possession. *Had the Act been intended to compel the production of private records, it would have likewise provided a judicial remedy to prevent their wrongful disclosure.*

It would seem fundamental that *private* information and *private* documents do not lose their *private* character merely because such documents have been submitted to a *governmental agency* either pursuant to a mandatory filing requirement or voluntarily in an effort to either comply with a regulatory program or cooperate with a governmental fact finding agency.[10]

One commentator states that there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government*, has paid for. Government's duty to re-

10. *See* Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards*, 6 Loyola L.J. 594, 611 (1975).

veal *its* inner workings provides no similar justification for the disclosure of private parties' operations."[11]

CONCLUSION

For the reasons stated, the information sought to be disclosed in *Chrysler* is *private* and not *governmental* information, should not be disclosed and this court should grant the Petition for Writ of Certiorari to put to rest this fundamental concept of the FOIA.

Respectfully submitted,

JESSE P. LUTON, JR.
BURTON C. BRANSTETTER
JOSEPH H. SPERRY
Attorneys for
Gulf Oil Corporation,
Amicus Curiae

December 22, 1977

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11. O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125, 1134 (1975).